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September 25, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: May 2, 2003
Case Number: TSO-0039

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx. (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

In November 2002, the Manager of a Department of Energy (DOE) operations office issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter, the operations office also informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the operations office forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. ' 710.25(e) and (g), on August 8, 2003, I convened a hearing in this matter (hearing).

In the Notification Letter the operations office indicates that the individual has been diagnosed by a DOE consulting psychiatrist as suffering from alcohol abuse and that alcohol abuse is a security concern under 10 C.F.R. ' 710.8(j)(Criterion J). The Notification Letter indicates that the individual has been arrested six times for alcohol related problems. Three of the individual's arrests were for driving under the influence of alcohol (DUI). Those DUI arrests occurred in April 1991, December 1997 and December 2001. He was also arrested for disorderly conduct

involving alcohol in April 1984 and May 1992 and for disturbing the peace involving alcohol in August 1977. The Notification Letter relied particularly on the recent DUI arrest that occurred in December 2001. On that evening at a local restaurant the individual listened to a band and consumed a number of beers. At midnight when he left the restaurant he decided since he had been consuming alcohol it would not be a good idea for him to drive home. Therefore, he decided to rest in the car. He occasionally ran the engine to warm the automobile. Later that evening a police officer approached the car. After talking with the individual he concluded that the individual was intoxicated. Since the individual was in control of the automobile (sitting in the driver's seat with the keys in his pocket) and his blood alcohol level was later determined to be .11, charges were filed against the individual for driving under the influence of alcohol.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. ' ' 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. ' 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, the individual in these cases is generally expected to bring forward testimony and/or other evidence which, taken together, is sufficient to

persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE & 82,752 (1995).

B. Basis for the hearing officer's decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a Decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. ' 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, commonsense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. ' 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING TESTIMONY

At the hearing the individual testified on his own behalf and he presented the testimony of a clinical social worker, his girl friend and two co-workers. The DOE presented the testimony of the DOE consulting psychiatrist.

A. Clinical social worker

The first witness was a licensed clinical social worker who is a counselor in an intensive outpatient treatment program for patients with alcohol addiction and alcohol abuse problems. Tr. at 10. He testified that in early June 2003 the individual was evaluated by the director of the program who determined the individual met the criteria for alcohol abuse. Tr. at 10. Soon after that evaluation the individual enrolled in the intensive outpatient program.

The clinical social worker testified that the program is a six week intensive outpatient program and that the individual attended all of his meetings. Tr. at 26. During the individual's treatment program the clinical social worker testified that he met with the individual several times during the Thursday group family education sessions of the program. He has also met privately with the individual on one occasion and has talked with him privately after some of the Thursday family group sessions. Tr. at 12. He testified that the individual has recently completed the program and is now eligible to participate in the clinic's after care program. However, he indicated he is not sure if the individual has started participating in the after care program. Tr. at 20-23.

The clinical social worker testified that the individual was originally in denial about the seriousness of his problem but as a result of active participation in the outpatient program the individual has developed the tools and understanding necessary to remain abstinent. Tr. at 12 and 25. He indicated that it was his opinion that in order for the individual to avoid a relapse the individual needs to abstain completely from using alcohol.

The clinical social worker was asked about the period of abstinence necessary to demonstrate rehabilitation. He indicated that, in general, after “one year of recovery the chances of a relapse have a tendency to be minimized.” Tr. at 24. He was also asked if he has any knowledge about the individual’s current period of abstinence, and he indicated that he did not. Tr. at 25. Finally, he was asked about the individual’s treatment records, and he testified that there was a written diagnosis by the clinical director, a written treatment plan and treatment notes. I indicated to the social worker that those document notes are usually submitted by individuals prior to our during the hearing in order to substantiate their participation and progress in the treatment program. He responded by testifying that “I’d be glad to present those upon request.” Tr. at 17. He then indicated he would need a written request from the individual. Tr. at 17. I indicated to the individual that it was his responsibility to determine whether he would submit the treatment plan and the treatment notes and to take the steps necessary to submit them.¹ Tr. at 17.

B. The DOE consulting psychiatrist

The DOE consulting psychiatrist testified that one year before the hearing he interviewed the individual and administered laboratory and written tests. The laboratory tests indicated the individual’s blood alcohol and liver enzymes were within normal limits. Tr. at 31. The written tests indicated that alcohol use has caused problems in the individual’s life and the individual may use alcohol to reduce stress. Tr. at 32. After the interview the DOE consulting psychiatrist prepared a written report dated June 21, 2002. The report indicates that during his interview the individual stated that he had been arrested six times for alcohol related problems and the individual dismissed each of the six arrests as bad luck or provided another similar rationalization. Tr. at 32. That report concludes that the individual suffers from alcohol abuse.

During his testimony the consulting psychiatrist confirmed the diagnosis detailed in his written report that the individual used alcohol habitually to excess and suffers from alcohol abuse as defined in the DSM IV. Tr. at 34, 39 and 41. It was his opinion that in order to demonstrate rehabilitation the individual should participate in a treatment program, attend alcoholics anonymous (AA) and maintain abstinence for one year. Tr. at 35. He testified that the

¹ See also my July 30, 2003, e-mail to the individual’s attorney in which I reminded the individual’s attorney that the submission of the evaluation report and the treatment notes would corroborate the individual’s claim of rehabilitation.

outpatient program described by the clinical social worker is an appropriate treatment program. Tr. at 48.

With respect to the individual's current state of rehabilitation, the consulting psychiatrist testified that the individual was off to a good start but is in the very early stages of his rehabilitation effort. Tr. at 94 and 97. He indicated that the individual is involved in the right type of program and that the change in his social activities is a positive step. Tr. at 95. Finally, he testified at this point the individual is in early full remission.

C. The individual's girl friend

The individual's girl friend testified that for 11 years she has been closely involved in all of the individual's activities. Tr. at 51. She indicated that most of their activities are family related and they spend a lot of their time with the families of her grown children and their children. Tr. at 62. She indicated the individual used to drink socially and on the weekends. On those occasions when he did drink he would have a few beers and maybe a mixed drink or two. However, she has never known the individual to use alcohol to excess and she has never seen the individual drink alcohol during the week. Tr. at 54.

She testified that on the night of the December 2001 arrest the individual was at a restaurant to see a band and that she was tired and therefore did not join him. Tr. at 59. She testified she did not believe the individual's arrest indicated a problem with alcohol because even though he went to the restaurant by himself and had more drinks than he originally planned, he made a good decision that he should rest in the car rather than driving home. Tr. at 59.

Finally, she testified that the individual had nothing to drink since June 2003. Tr. at 55. She indicated that she is supporting the individual in his rehabilitation program and she intends to participate in some of the aftercare meetings with the individual. Tr. at 55, 56 and 60. The individual has told her that he never wants to drink alcohol again and she believes that he will remain abstinent. Tr. at 56.

D. Two co-workers

The first co-worker testified that the individual has excellent attendance and job performance and he is a very conscientious worker. Tr. at 65. The second co-worker testified that he has known the individual on the job for five years and that he has been his supervisor for two years. Tr. at 69. He testified that the individual is a quality employee who performs an essential function that will be difficult to replace. Tr. at 71. He testified that it would greatly benefit the DOE if the individual returns to an active work assignment. Tr. at 71.

E. The individual

The individual testified about his arrest in December 2001. He stated that he went to a restaurant to hear a band perform, as he had done on several previous occasions. Tr. at 78. He testified that when he went to the restaurant he only intended to have two or three beers but that he got involved in talking to people and listening to the band and consumed more alcohol than he intended. Tr. 79. When he left the restaurant he realized he should not drive home and he decided to rest in his car. The individual indicated that his behavior in not driving his car demonstrates that he was acting responsibly after consuming alcohol.

The individual testified that he was assessed for admission to the intensive outpatient treatment program described above on June 20, 2003. Tr. at 80. He testified that the program consisted of 14 sessions, three sessions per week and each session was 2½ hours. He indicated that the program made him look at his behavior and admit that his problems with drinking really were a result of his poor decisions. Tr. at 81. He believed that he is not an alcoholic because he is not physically dependent, but admitted that he has abused alcohol. Tr. at 81. However, he recognized that the only cure for his problem is abstinence and he is committed to staying abstinent. Tr. at 82. He testified he is currently attending the one night a week aftercare program held at the clinic. He further testified that he is trying to get started with AA. Recently he has attended meetings of several different groups and he is trying to find a group and a sponsor with problems similar to his. Tr. at 84 and 88. Finally, he testified that he is avoiding the types of social situations with co-workers that have in the past involved alcohol. He indicates that he understands that in order to stay abstinent he needs to avoid those situations that have been resulted in alcohol consumption in the past. Tr. at 92.

IV. ANALYSIS AND FINDINGS

In his report and his testimony the DOE consulting psychiatrist diagnosed the individual as suffering from alcohol abuse. During his testimony, the individual's clinical social worker indicated that he agreed with that diagnosis. Tr. at 11. Therefore, the question before me is whether the individual has mitigated the security concern associated with a diagnosis of alcohol abuse.

The individual presents three arguments for the purpose of mitigating the security concern. The first is his assertion that he has made changes in life patterns involving alcohol use. He claims that he has joined a treatment program, has been abstinent since June 2003 and is committed to future abstinence. The individual believes that this evidence demonstrates that he is rehabilitated and can be relied upon not to consume alcohol in the future. His second argument is that his alcohol problem was never severe. The third argument is that his skills as a machinist will be

hard for the DOE to replace and that his alcohol problem has never affected his job performance.

1. Rehabilitation

The individual has not presented convincing evidence that he has been rehabilitated. Both the DOE consultant psychiatrist and the clinical social worker testified that while the individual is currently in early full remission, the individual must establish a one to two year period of abstinence before he can be considered to be rehabilitated. On the basis of the individual's limited period of sobriety (June 2003 through the date of the hearing, August 8, 2003), I find that the individual has failed to demonstrate rehabilitated from alcohol abuse.

Furthermore, while not necessary to my determination that the individual has not at this time had a sufficient period of sobriety to demonstrate rehabilitation, the evidence submitted at the hearing does not clearly demonstrate that the individual has been abstinent for two months and is committed to abstinence. I recognize that the individual and his girl friend testified that he has been abstinent. While their testimony seemed candid, my experience indicates that such testimony tends to be self-serving and may omit some derogatory information. Testimony from co-workers or friends with whom he occasionally drank alcohol prior to June 2003 indicating their observations about the changes in his behavior would have been helpful in convincing me that he has changed his behavior. Also, testimony from the individual's adult family members about the individual's alcohol use would have been helpful in convincing me that he is currently abstinent and that he has a commitment to remaining abstinent. Neither type of testimony was submitted. Moreover, I am concerned that the individual's admitted inability to find an AA group and the suggestion in his testimony that he is able to consume alcohol in moderation without serious consequences indicate that he may not be fully committed to long term abstinence. Further, I am concerned that the individual's failure to submit the written diagnosis and treatments notes from his rehabilitation program may indicate that he does not want to present the information because it is unflattering.

B. Seriousness of the individual's alcohol use.

With regard to his argument that the DOE security concern should be considered partially mitigated because his alcohol problems were spaced over a long period of time and were never severe, the individual has pointed out that his actions associated with the December 2001 DUI arrest were controlled. He is correct that not driving after drinking at the restaurant in December 2001 does indicate that he maintained some control. However, the fact that he drank more than he had planned to drink when he went to the restaurant indicates he has difficulty controlling his level of alcohol consumption. He is also correct that the arrests prior to December 2001 were some time ago - six and eleven years. While it has been several years since the prior arrests and his 2001 arrest was a less serious DUI, his multiple arrests for alcohol related problems indicate a serious long term problem related to alcohol consumption. Therefore, he has not convinced me

that his alcohol abuse is a less serious problem for him than for other individuals who have been diagnosed as abusing alcohol.

C. Workplace skills.

Finally, I must consider his argument that he is a valued employee with a skill that will be difficult to replace. I was convinced by the two co-workers that he is a valued employee who has done an outstanding job for a number of years and that the loss of his skills on the job may adversely affect the DOE mission. However, it is not my role to consider mitigation of a security concern on the basis of the DOE need for the individual's skill.² *Personnel Security Hearing (Case No. VSO-0289 Note 6)*, 27 DOE & 83,025 (2000).

V. CONCLUSION

As indicated above, given the diagnosis of the DOE consulting psychiatrist and the brief period of the individual's rehabilitation efforts and his limited period of abstinence, I do not believe that the individual has mitigated the DOE Criterion J security concern. Therefore, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. ' 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: September 25, 2003

² Section 710.27(b) provides that "Possible impact of the loss of the individual's access authorization upon the DOE program shall not be considered by the hearing officer." 10 C.F.R. § 710.27(b).